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CONFLICTING THEORIES OF GOOD WILL

An endless chain of good will concepts is daily affecting the distribution of profits. But the usual definitions of good will given in the textbooks on economics are almost entirely out of harmony with those contained in the law. To orthodox economists, consumers' good will is the favorable attitude of the persons with whom the entrepreneur has trade relations. It is above all a state of mind which is, indeed, frequently a direct result of these relations, and, therefore, an advantage or economy, the actual existence of which is external to the process of production. To the jurist, however, such good will is an intangible element originating in or adhering to the productive process, and is, as a rule, an economy of the factors of production. In fact, so closely is good will associated with the physical agents in production as a property concept that, except in a few instances, its relation to the trade or patronage of the public is largely forgotten. Considered therefore as the basis of a property right, there is little ground for compromise between the economic and the legal concepts. The antithesis is plain. Whether the existence of this form of good will as an economic factor rests in the productive process, on the one hand, or in the minds of consumers on the other, is the underlying issue; and needless to say, the conflicting theories in court decisions are most pertinent to the acquisition of wealth.

The economist has described at least three forms of good will. Each of these he has traced to the mind of the consumer, the capitalist, or the laborer, who either buys from the entrepreneur or sells to him a commodity or personal service. If after every such transaction with the entrepreneur each person remains wholly satisfied, it is clear that good will appears as the obvious intent or inclination of the individual to continue such trade relations. Briefly stated, it is the economic attitude of each person which tends to perpetuate present relations and further dealings with the entrepreneur. Consequently, certain economists have defined good will as the reputation, business standing, or favor which the entrepreneur enjoys in the eyes of the public.¹ It has also been explained as the habit or custom which leads men to deal with a definite or particular enterprise in preference to others of the same kind.² In a word, then, its present existence, so interpreted, lies in the habits, impressions and conceptions of individuals rather than in the advantages of any location or the efficiency of any productive process.

Strange as it may seem, English and American courts, as a rule, have described good will either as a part of the productive process, or as

¹ Sparling, *Business Organization* (1906) 39-40; Hobson, *The Evolution of Modern Capitalism* (1913) 246; Veblen, *The Theory of Business Enterprise* (1904) 170; Commons, *Industrial Good Will* (1919) 18, 19.

² Hadley, *Economics* (1896) 70; Ely, *Outlines of Economics* (3rd rev. ed. 1919) 535-6; 1 Taussig, *Principles of Economics* (3rd ed. rev. 1921) 175.

an intangible form of property clinging to the natural agents, premises, location, buildings and other factors, which form the really essential components of a well organized industry. As a matter of fact, it is frequently said to consist of the advantages, services, and benefits which give rise to the custom and patronage of a particular enterprise. With few exceptions, then, it is not, as a legal concept, the result of the favorable attitude and kindly feeling of satisfied customers, as economists would maintain; but on the contrary, it is the attracting element or force which draws purchasers to an enterprise. In fine, the legal definitions disappoint one, and only a complete study of more than a score of theories will give one a full understanding of legal good will. But for the purpose of discussion, these concepts are gathered here under six different heads.

I

In the first place, a number of concepts represent good will as embodied or inherent in the grounds, buildings, productive processes, and stock of an enterprise.

For example, a fundamental theory of English law makes good will inseparable from land and explains it as purely local in character. Thus in an early case,³ Lord Eldon speaks of "the sale under the bankruptcy of Lot 1, and the good-will belonging to those premises, or the trade established upon them." And on the next page, he gives a much-quoted definition. "The good-will, which has been the subject of sale," he explains, "is nothing more than the probability, that the old customers will resort to the old place." This definition has been gradually modified, but natural agents, location and similar premises are still taken as important elements of the land concept in the estimation of good will.⁴ This theory was put succinctly in a recent decision. The items of good will and the loss of profits were considered only "loose phrases"; "but in strictness," said the court, "the thing which is to be ascertained is the price to be paid for the land" ⁵ In fact, it has also been explained that this form of good will consists of the natural advantages of location before improvements have been made and that under such circumstances the premises are utilized directly by the consumer or purchaser.⁶ In the course of time, however, the value of these natural advantages may be greatly enhanced by personal efforts. The personal endeavors of the occupier

³ See *Crutwell v. Lye* (1810) 17 Ves. Jr. 334, *346.

⁴ See *Churton v. Douglas* (1859) 1 Johns. Eng. Ch. 174, 188; *Ginesi v. Cooper* (1880) L. R. 14 Ch. Div. 596; *Edmands v. Boston* (1871) 108 Mass. 535, 549; *Findlay v. Carson* (1895) 97 Iowa 537, 66 N. W. 759; *Rawson v. Pratt* (1883) 91 Ind. 9, 16; *Trego v. Hunt* [1896] A. C. 7, 12 T. L. R. 80; *Bell v. Ellis* (1867) 33 Cal. 620, 625; *Mendez v. Holt* (1888) 128 U. S. 514, 521-22, 9 Sup. Ct. 143; *Miller & Lux v. Richardson* (1920) 182 Cal. 115, 187 Pac. 411.

⁵ See *Commissioners of Inland Revenue v. Glasgow, etc. Ry.* (1887) L. R. 12 A. C. 315, 321.

⁶ *Hopkins, Trademarks, Tradenames and Unfair Competition* (2nd ed. 1905) § 79.

in this instance, said a court, have worked the change; but it is usually to the landlord, or to the tenant who has the right to use the premises that this increased value enures.⁷ Consequently, this form of good will, as will be seen, is purely local in character; it is closely confined to the physical property and, wholly irrespective of any person occupying the premises, will pass with the land to the lessee or to the purchaser.⁸

Still again, good will is often interpreted as actually arising from, and adhering to the tangible premises on which some form of business is transacted. Thus it has been explained in a certain opinion that the "Good will may adhere to, or spring out of, corporeal property, or a tangible locality or establishment; but I think it would be new doctrine to hold the reverse, and treat the material property as an incident of the good will."⁹ Also, it has been noted that the good will, attaching formerly to a particular enterprise, may upon the latter's dissolution be transferred automatically to the premises. "In that case," declared the court, "as a distinct property it is gone. It then attaches to, and enhances the realty, and the value of it is realized in renting or selling that."¹⁰ In short, in the discussion of local good will, it is plain that this land concept continually crops out in state decisions and constantly serves to warp the ideas of legal tribunals. Indeed, it is the primary theory to which judges still cling in their description of the elusive subject.

In a similar manner, good will may result from the peculiar advantages of particular buildings and their mechanical equipment. But this statement refers more especially to rented buildings, manufacturing establishments and commercial houses. In *Elliot's Appeal*,¹¹ for example, it was held that the good will of a certain firm was strictly local and did not exist independently of the house in which the business was kept; and to the same effect are other important decisions.¹² It is often difficult, however, to separate the good will incident to a splendid location as such from that of the buildings or other improvements incorporated in the premises.¹³ A case in point is that of *Bassett v. Percival*.¹⁴ The good will of a particular store in Boston had been sold without a special contract barring the vendor from entering immediately into competition with the purchaser; and strangely enough, in rendering the decision, the court distinguished between the active trade or business within the store itself and

⁷ See *Llewellyn v. Rutherford* (1875) L. R. 10 C. P. 456, 467; *Williams v. Farrand* (1891) 88 Mich. 473, 50 N. W. 446; *Chittenden v. Witbeck* (1883) 50 Mich. 401, 420.

⁸ *Smith v. Gibbs* (1862) 44 N. H. 335, 344; *Myers v. Kalamazoo Buggy Co.* (1884) 54 Mich. 215, 20 N. W. 545.

⁹ See *Sheldon v. Houghton* (C. C. 1865) 5 Blachf. 285, 291.

¹⁰ See *Musselman and Clarkson's Appeal* (1869) 62 Pa. St. 81, 83.

¹¹ (1869) 60 Pa. St. 161.

¹² *Musselman and Clarkson's Appeal*, *supra*, footnote 10; *Chissum v. Dewes* (1828) 5 Russ. 29.

¹³ *Edmonds v. Boston*, *supra*, footnote 4; *Llewellyn v. Rutherford*, *supra*, footnote 7; *Rawson v. Pratt*, *supra*, footnote 4.

¹⁴ (Mass. 1862) 5 Allen 345, 347.

the custom which the enterprise might draw from the remainder of the city. But it is to be observed that a distinction was thereby made, perhaps unconsciously, between active and potential patronage. The first form of patronage was, of course, confined largely to trade within the store. Obviously, the court was influenced by the old idea that good will as such adhered exclusively to the premises; for in referring to the disposal of it, the court explained that "It was nothing more than a sale of the custom or trade which appertained to the place where the vendor was then carrying on his business." In addition there was also the second trade area surrounding the premises, which contained inchoate patronage and potential good will; and the latter the court considered as separate from the good will adhering to the store. The seller of the enterprise was, therefore, allowed to set up another establishment near the first and to compete for the potential custom that might still be attracted by energy and enterprise. Again, in *Cottrell v. Babcock Printing Press Mfg. Co.*¹⁵ the good will sold was confined to a particular stand, and the seller was allowed to compete by all lawful means in the same business with the vendee.

In all of these instances, there is a universal rule that after its sale, the good will shall not be impaired by any subsequent act of the vendor. Consequently, whether the latter is ever allowed to act as a competitor depends upon the form of the good will passing to the purchaser. It may therefore be noted in this relation that issues occur in which the active good will seems to extend over large areas. That is, the active trade area is somewhat extensive, including also what may be termed potential good will; and as the actual legal exchange of economic goods is always protected in law, the seller of an enterprise under these conditions is not allowed to become an active competitor. Such circumstances arise in selling a teamster's route or in retailing newspapers or milk by means of carriers, where both active and potential good will are themselves contiguous and closely related to the existing patronage.¹⁶

Whether good will itself may center upon the stock or output offered for sale is a question upon which judges have also disagreed. In this connection it was stated in *Rawson v. Pratt*¹⁷ that "As a rule, it may be

¹⁵ (1886) 54 Conn. 122, 138, 6 Atl. 791.

¹⁶ In the first instance the good will of a teamster's route was sold, and though there was no covenant to the contrary, it was held by the court that the seller could not compete with the purchaser. *Angier v. Webber* (Mass. 1867) 14 Allen 211. In like manner, a person who sells the title and good will of a certain newspaper or milk route has no right thereafter to canvass for customers in the prescribed territory. *Wentzel v. Barbin* (1899) 189 Pa. St. 502, 42 Atl. 44; *Senter v. Davis* (1869) 38 Cal. 450; *Tuttle v. Hannegan* (1874) 54 N. Y. 686; *Munsey v. Butterfield* (1882) 133 Mass. 492. Still it is to be noted that there are certain decisions which point to the contrary, and, therefore, form important exceptions to the usual rule. *Fallon v. Chronicle Pub Co.* (Sup. Ct. D. C. 1874) 1 MacAr. 485; *Hathaway v. Bennett* (1854) 10 N. Y. 108; *Dayton v. Wilkes* (N. Y. 1859) 17 How. Pr. 510; *Fenn v. Bolles* (N. Y. 1858) 7 Abb. Pr. 207.

¹⁷ *Supra*, footnote 4, p. 16.

said that 'good will' is never an incident of a stock of merchandise; but, generally speaking, it is an incident of locality or place, of the store-room or place of business." But it is to be noted that there are important exceptions to this rule, for several decisions have held without qualification that good will is an incident of the stock in trade;¹⁸ and it is therefore to be emphasized that the preceding principle, which confines good will to the premises, is no longer to be considered as conclusive.

Good will may arise in and attach itself to the technical process of an industry. This is particularly true of trade secrets, for the process may secure greater patronage and increased profits for the owner by rendering the consumer a more efficient service or a better commodity. In this instance good will may be largely controlled through the exclusive use of the secret process, and its value is enhanced in proportion to the degree of monopoly established. In an English case¹⁹ a Mr. Bryson agreed to sell the good will of his trade for £1500 and the exclusive benefit of the secret for an added £1000. The latter was compelled by the court to carry out his agreement both in the sale of the good will and of the secret process. It was clear that the law did not permit a general restraint of trade, but a "Trader may sell a Secret of Business, and restrain himself generally from using that Secret."²⁰ Moreover, the good will here passes with the sale of the secret, and it is obvious that the seller thus restrains himself from ever taking advantage of it.²¹

II

In the next place, the good will of a business may be established and held permanently through personal effort. In fine, it may be the result of managerial ability, personal characteristics, accepted opportunities,

¹⁸ A certain well-advertised bakery acquired a large patronage by making a particular kind of bread, the loaves of which were of a definite shape, size and quality. The good will of the enterprise was declared to be property subject to protection from the infringement of competitors. *George G. Fox Co. v. Glynn* (1906) 191 Mass. 344, 78 N. E. 89. In another case, one who had sold the stock and the good will together, could not relieve himself from liability respecting the good will by proving that the stock alone was worth the full amount paid by the purchaser. *Herfort v. Cramer* (1884) 7 Colo. 483; *Cruess v. Fessler* (1870) 39 Cal. 336. Again, in an English case the good will of a seller of victuals was declared by the court to be incident to the stock and the license, but not to the premises on which the business was established. *England v. Downs* (1842) 6 Beav. 269. In a similar manner it was held in a Scotch case that the seller had received his full share of the good will value in the increased price which he had received for the goods. *Bell's Trustees v. Bell* (1884) 12 Rettie 85, 90.

¹⁹ See *Bryson v. Whitehead* (1822) 1 Sim. & Stu. 74, 77; see also *Moorehead v. Hyde and Braden* (1874) 38 Iowa 385.

²⁰ See *Bryson v. Whitehead*, *supra*, footnote 19, p. 77.

²¹ *Hogg v. Darley* (1878) 47 L. J. Ch. 567; *Leather Cloth Co. v. Lorisont* (1869) L. R. 9 Eq. 345. But to retain this good will the technical process need not be a trade secret or anything more than mere equipment; for a mortgage of the machinery, type, press, tools, and good will of a newspaper company cannot be foreclosed to secure the good will after all the tangible property has been alienated, worn out, or destroyed, and the corporation consolidated with another. *Metropolitan Nat. Bk. v. St. Louis Dispatch Co.* (C. C. 1888) 36 Fed. 722.

risks deliberately taken, trade control, and, lastly, artificial monopolies. But even here legal habit of the judges acquired in rendering previous decisions often asserts itself, and the courts frequently attach good will to the premises on which an enterprise has been firmly established.

Thus good will may have its origin in the honest and enterprising management of a business. Especially is this true if the personal efforts of one or two men alone have built up the reputation of an enterprise and greatly enhanced the value of its patronage. Although decisions of American courts recognize the importance of this managerial ability and that it is a fundamental element in establishing good will,²² the judges are nevertheless somewhat at sea in interpreting its exact nature and in determining whether it may be separated from the seller and transferred with other assets of an enterprise.²³ Furthermore, it has been decided that if good will depends on the personal skill of the one who parts with it, it is not transferred to others merely through a sale of the premises.²⁴ It is also a serious question here whether the trust, confidence and esteem of patrons can be actually measured, sold and transferred as an intangible asset; and while jurists seem to agree that the latter is a favor or preference rendered to the entrepreneur by the public, it must none the less be attached to some material object, if it is to be transferred by sale.²⁵

It may next be pointed out that good will includes at times what may be termed wages of management. Commissions and premiums on insurance policies may be taken as examples. But it has been said that the good will of a business is something more than merely the amount of commissions on certain premises and loans belonging to a particular plaintiff; and clearly enough, in the case of *Stanton v. Zercher*²⁶ the court recognized that commissions are not typical forms of good will. At

²² *Chittenden v. Witbeck*, *supra*, footnote 7; *Jefferson v. Markert* (1900) 112 Ga. 498, 504, 37 S. E. 758.

²³ In a New Hampshire case, it was stated plainly that the sale of a business with its good will "does not include the popularity and personal qualities of the seller, which are not transferable." See *Smith v. Gibbs*, *supra*, footnote 8, p. 345. The basis of this species of good will is, of course, partly inherent in the individual, being due to good business tact, character, personality, and is obviously augmented by the trust and confidence of patrons. Thus in the case of *Vonderbank v. Schmidt* (1892) 44 La. Ann. 264, 268, 10 So. 616, the definition previously given by Judge Cooley was affirmed: "Good will is the favor which the management of a business wins from the public and the probability that all customers will continue their patronage." And at another time the same court said: "It is not exclusively to the person that what is termed the 'good will' is attached, but it is chiefly to the place." *Succession of Journe* (1869) 21 La. Ann. 391, 393. Also, in an English case the principal asset of a business consisted of the good will, and the Vice-Chancellor explained that "All the partners contributed to it, and whether in equal or very unequal proportions, is quite immaterial. It belongs equally to them all, and is an important and valuable interest which the law recognizes and will protect." *Williams v. Wilson and McClelland* (N. Y. 1884) 4 Sandf. Ch. 379.

²⁴ *Cooper v. Metropolitan Board of Works* (1883) 25 Ch. D. 472.

²⁵ *Chittenden v. Witbeck*, *supra*, footnote 7, p. 421; *Derringer v. Platt* (1865) 29 Cal. 292; *Myers v. Kalamazoo Buggy Co.*, *supra*, footnote 8.

²⁶ (1918) 101 Wash. 383, 392, 172 Pac. 559.

least they do not, as a rule, represent the intangible property usually included under that term.

Cases occur in which good will is also the result of opportunity, for it is often defined in legal decisions as "probability" or "chance." In California, by way of illustration, it has been described as a "well-founded expectation of continued public patronage."²⁷ And in an English case,²⁸ "It is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on." American courts have also explained it as "The probability that the business will continue in the future as in the past."²⁹ It is to be observed at this point that these terms are most frequently used in referring to the "chance or probability" of the purchaser in succeeding to the good will of his predecessor's business. However, instances may arise none the less in which they relate wholly to the preservation of the good will by the person who has established it.³⁰

In a somewhat different sense good will is frequently wholly professional in character. It is then the outgrowth of the personality and the services of professional men, and is, of course, largely the result of labor and effort. But unlike many kinds of legal good will, this type is more or less mobile. That is to say, it clings to the individual and passes with him if he chooses to practice in another place. In this respect good will may be separated from the buildings and the locality formerly occupied by such practitioners. To be sure, the practice of such men may be sold, and they may bind themselves not to solicit business from their former patrons; but without this deliberate alienation of their professional advantages, the combined elements of efficiency, personality, esteem and trust, which so largely form the basis of professional good will, undoubtedly follow the individual if the business connections are not deliberately broken. Nevertheless, a distinct advantage may often accrue to one who establishes himself on premises formerly occupied

²⁷ See *Dodge Stationery Co. v. Dodge* (1904) 145 Cal. 380, 388, 78 Pac. 879.

²⁸ See *England v. Downs*, *supra*, footnote 18, pp. 276-7.

²⁹ See *Moreau v. Edwards* (1875) 2 Tenn. Ch. 347, 349; *Chittenden v. Witbeck*, *supra*, footnote 7, p. 420; *Myers v. Kalamazoo Buggy Co.*, *supra*, footnote 8.

³⁰ For example, a local insurance agent, receiving his compensation entirely in the form of commissions, sold the good will of his agency, and the court said in part: "Notwithstanding the precarious value of such a right, there seems to be no good reason why it should not be recognized and protected by the law. The good-will of an established business, which is a common subject of contract, is nothing but the chance of being able to keep the business which has been established." *Barber v. Connecticut Mut. Life Ins. Co.* (C. C. 1883) 15 Fed. 313; see *Phyfe v. Wardell* (N. Y. 1835) 5 Paige 268; *Armour v. Alexander* (N. Y. 1844) 10 Paige 571; *Graves v. Kennedy* (1899) 119 Mich. 621, 78 N. W. 667; *Hathaway v. Bennett*, *supra*, footnote 16. More remarkable still, an insurance corporation, which was about to discontinue its business was allowed to transfer a list of its policies and its entire good will to another company. *Bowers v. Ocean Accident & Guarantee Corp.* (1906) 110 App. Div. 691, 97 N. Y. Supp. 485. Thus the good will, though certainly more than a mere chance, was sold entirely separate and independent of the enterprise itself.

by skilled men of his own occupation. Surely because of habit, custom, or lack of initiative, old patrons may at times resort to the same premises and patronize the new occupants.

Wholly unlike the previous concept, it may be noted that good will has been traced to the exclusive ownership of property or to a differential advantage arising from sole ownership. The benefit arises here from an increase of profits due to the concentration of good will and possibly through an increase in its value. It has been said³¹ that if one person becomes sole owner of partnership property, "the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit, essentially connected with the sole ownership." The mere knowledge of the fact that he is sole owner and manager of the property would give this person, the court believed, a definite advantage over a former partner who continued to compete in the same trade independently of the partnership.

In particular instances, indeed, good will may be the result of a skillfully arranged monopoly. Needless to say this sort of arrangement has not grown up wholly through the favorable patronage of the purchasing public, for good will here is simply the legal opportunity of carrying on a business comparatively free from competition. It may, for example, be the special privilege of selling liquor to soldiers of a certain barracks,³² or beer to specified public houses.³³ Still again, this monopoly is to be seen in the exclusive right to sell supplies to different state institutions and social and religious associations. In like manner the opportunity to secure a scarcity increment by exploiting demand is also utilized by public utilities;³⁴ for in consuming the services of such corporations, the public often possesses no alternative and must constantly be subject to increasing prices for water, light, gas, and transportation. Certainly such good will is not kindly feeling, favorable attitude, or good disposition on the part of consumers. In fact, the latter may be devoid of all

III

Of great pertinency is the fact that good will has not seldom been defined by jurists and accountants as simply value. This is, of course, the result of circumstances which have rendered its evaluation necessary;

³¹ See *Kennedy v. Lee* (1817) 3 Mer. 441, 452. Clearly enough, the first person possesses a differential advantage which is somewhat similar to that arising from the elimination of competitors, restraint of trade, or the establishment of a differential monopoly. His advantage differs from the others only in degree; for in all probability he possesses one distinct superiority in efficiency which attracts customers, and another through exclusive patronage so long as he maintains this efficiency.

³² *Rex v. Bradford* (1815) 4 M. & S. 317.

³³ *Allison v. Overseers of Monkwearmouth* (1854) 4 Ell. & Bl. 13.

³⁴ *Reg. v. The Grand Junction R. R.* (1844) 4 Q. B. *18; *Reg. v. North Staffordshire Ry.* (1860) 30 L. J. M. C. 68; *Reg. v. Brighton Gas, Light and Coke Co.* (1826) 5 B. & C. 466.

and the legal methods of computing its value are taken from the evidence of business men and expert accountants, both of which have, in this relation, had considerable influence on recent legal opinions..

The legal value theory is given here first. As late as 1916, a surrogate court of New York presented what it thought to be a new definition: "The definitions of 'good-will' are many and irregular," said the court,³⁵ "and I prefer to define it, for myself, as that economic value recognized in law and denoting the chance of future profit while carrying on an established business of repute in public consideration." The same idea had, however, occurred in previous English cases: "Where a trade is established in a particular place," runs one decision,³⁶ "the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on." Also, in the case of *Cook v. Collingridge*,³⁷ the supposition is advanced that good will may be defined as "the value that the chance that the customers of partners retiring altogether will deal with those who purchase from such retiring partners and succeed to their establishment. . . ." In these excerpts judges have avoided the task of analyzing good will, and in the value theory they possess a tangible concept which is easily applied.

In much the same vein runs the theory of accountants. Thus one has asserted:³⁸ "Good will is the monetary value placed upon the connection and reputation of a mercantile or manufacturing concern, and discounts the value of the turnover of a business in consequence of the probabilities of the old customers continuing." Another has explained that "Good-will, which may be taken as the typical form of Immaterial Assets, represents the value of business connections, the value of the probability that present customers will continue to buy in spite of the allurements of competing dealers."³⁹ Doubtless the value concept of good will may be expected to grow in importance and to meet the approval of writers on corporation finance who have also included it in their many definitions of good will. But it clearly avoids final analysis and fails, moreover, to recognize the principle that good will originates primarily in the minds of consumers.

IV

Good will is also explained as the intangible connection between an enterprise and the public. This connection includes various forms of

³⁵ See *Matter of Borden* (1816) 95 Misc. 443, 444, 159 N. Y. Supp. 346.

³⁶ See *Austen v. Boys* (1858) 27 L. J. Ch. 714.

³⁷ (1825) 27 Beav. 456, 458-9.

³⁸ See Lisle, *Accounting in Theory and Practice* (1903) 134.

³⁹ See Hatfield, *Modern Accounting* (1919) 107. Of like nature is the statement of the Treasury Department which has given the following short definition: "Good-will represents the value attached to a business over and above the value of the physical property." Quoted by Gilman, *Principles of Accounting* (1916) 192.

legal good will and the courts recognize that only constant and persistent vigilance is the price of its successful maintenance.

Considered in this sense it may be described, first, as an intangible trade connection with the public. In an early case Sir John Romilly said,⁴⁰ " . . . it seems to be that species of connection in trade which induces customers to deal with a particular firm." A Wisconsin court has declared it to be "a sort of beaten pathway from the seller to the buyer."⁴¹ And this good will is described as varying in every case, the connection being maintained by a variety of methods. Another citation has made it equivalent to an attracting force. "But attracting customers to the business," declared the court,⁴² "is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing which the late firm sold, and they really had nothing else to sell in the shape of goodwill." The judge then spoke of this relation in the sale of a stone merchant's business: "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the good will thereof?"⁴³ Also, many opinions hold that good will is an asset of a going firm only, and that a business not in operation does not retain its good will. There seems to be a definite confession here that the connection between the business and the public must continue. But if this connection and good will depend upon the demands of the public, it must be conceded at once that the good disposition of the people is a vital element in it.

This connection may also be maintained by means of the firm name, labels, trade marks, and other symbols by which the public has identified a well established enterprise. Indeed, these connecting links are sometimes described as good will, and are, therefore, frequently included in a description of its sale. Thus in the case of *Peltz v. Eichele*⁴⁴ it was stated that "The good will of a business as embodied in a firm name, or in the labels used, will be protected on principles analogous to those applied in cases of infringement of trade marks. It is true that a trade-mark is held by some of the text writers, and, perhaps, in some adjudicated cases, to be a part of the good will, and necessarily included in a sale thereof." However, it is still to be noted that in *Cooper v. Hood*,⁴⁵ on the contrary, the use of the name, the trade mark, and the vendor's covenant were all included collectively in the good will of the enterprise.

⁴⁰ See *Wedderburn v. Wedderburn* (1855) 22 Beav. 84, 104.

⁴¹ See *Rowell v. Rowell* (1904) 122 Wis. 1, 17, 99 N. W. 473.

⁴² See *Ginesi v. Cooper*, *supra*, footnote 4, p. 600.

⁴³ *Ibid.*, p. 600. But strange to say, in a similar case, the same judge declared that the good will of a public house was nothing but the habit of the customers resorting to it. See *Ex parte Punnett* (1880) 16 Ch. D. 226, 233. This may be taken as another illustration in which legal concepts have been modified by the same court to meet local conditions.

⁴⁴ (1876) 62 Mo. 177, 179.

⁴⁵ (1858) 26 Beav. 293, 299.

In like manner in *Slater v. Slater*⁴⁶ the name is said to be a part of the good will. But obviously whether the good will is really embodied in the name and the trade mark, as is asserted in the first case, or the name in the good will, as is affirmed in the last two opinions, is, it seems, immaterial.⁴⁷

A third type of connection is the simple introduction or recommendation given to the customers at the time a purchaser is initiated into an enterprise. For example, an English court has explained⁴⁸ that " . . . very frequently the good-will of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it: it is merely the advantage of the recommendation of the vendor to his connexions, and his agreeing to abstain from all competition with the vendee."⁴⁹ And in an earlier case Sir George Jessel in commenting on the sale of a medical practice has said:⁵⁰ "What is the meaning of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys, he has nothing else to sell except the introduction."

V

The number of decisions in which trade and patronage are taken as closely related to good will, though few in number, indicate a tendency

⁴⁶ (1903) 175 N. Y. 143, 149, 67 N. E. 224.

⁴⁷ That intangible asset, which jurists call good will, is primarily the result of economic conditions, and adheres to, and may be sold with the name and trade-marks of an enterprise; for the latter are regarded, of course, as of importance, and the right to their exclusive use is generally recognized. *The Iowa Seed Co. v. Dorr* (1886) 70 Iowa 481, 30 N. W. 866; *Williams v. Farrand*, *supra*, footnote 7; *Fish Bros. Wagon Co. v. La Belle Wagon Works* (1892) 82 Wis. 546, 52 N. W. 595; *Armington v. Palmer* (1898) 21 R. I. 109, 42 Atl. 308; *Vonderbank v. Schmidt*, *supra*, footnote 23. But whether under these circumstances the name of a firm attaches to the premises, and passes with their sale, or is a separate and independent part of the good will is still another mooted question. A court of Iowa has declared that in a case like this, the name is not in the nature of a trade mark and of necessity is closely connected with the good will. "It is the designation by which the company is known and addressed by its patrons. And the good will is the probability, regardless of its foundation, that the patronage of these will be continued." See *Millspaugh Laundry v. First Nat. Bk.* (1903) 120 Iowa 1, 6, 94 N. W. 262. Moreover, the good will of a newspaper depends to a large extent on its name or title, and seldom is the locality of the publishing house or the reputation of the proprietor of any great moment. *Boon v. Moss* (1877) 70 N. Y. 465; *Bain v. Monro* (1878) 5 Rettie 416; Allan, *Goodwill* (1889) 45, 46; *Robertson v. Berry* (1878) 50 Md. 591; *Walter v. Emmott* (1885) 54 L. J. Ch. 1059. But an important exception to this rule occurred in the case of an English magazine largely because the celebrated author, Charles Dickens, held the relation of both contributor and proprietor, and his name therefore carried with it considerable prestige. *Bradbury v. Dickens* (1859) 27 Beav. 53. Still it may be noted that under other circumstances, the name of a business is often so attached to the premises that it passes with a sale of the property. *Booth v. Jarrett* (N. Y. 1876) 52 How. Pr. 169; *Woods v. Sands* (1875) 1 Cox, *Manual of Trade Mark Cases* 467.

⁴⁸ See *Potter v. Commissioners* (1854) 10 Exch. Rep. 146, 155.

⁴⁹ See also *Walker v. Mottram* (1881) L. R. 19 Ch. D. 355, 363.

⁵⁰ See *May v. Thompson* (1882) L. R. 20 Ch. D. 705, 718; see also *Bain v. Monro*, *supra*, footnote 47.

among judges to approach the economist's point of view. At the same time a distinction may be drawn here between active and potential good will, which furnishes us with another important departure from the usual theory of the law.

Good will may be connected with the established patronage or custom of a going concern, and it is then described frequently as the favor or preference which an enterprise enjoys at the hands of the public. But stated concisely, it is the simple fact that active custom or patronage has been drawn to an enterprise and probably will continue. In a leading Michigan case,⁵¹ it is defined as ". . . the favor which the management of [a business] has won from the public, and the probability that the old customers will continue their patronage . . ." And to the same effect was another decision in this State.⁵² In both cases the idea of probability is constantly used to express or emphasize this preference on the part of the purchasing public. The first of these opinions was later accepted by the Supreme Court of Louisiana⁵³ and good will was defined more explicitly as simply patronage. It was stated ". . . that it is the general public patronage and encouragement which a business receives from its customers on account of its local position; that is the subject of value and price, and of bargain and sale, though intangible . . ." ⁵⁴ In another instance in the same State a market stall had been sold with its good will, "by which is understood," said the court,⁵⁵ "the run of custom which the transferrer had attained by the patronage of his friends resorting to his stand to purchase, and generally from the reputation his stand had acquired as one at which good and wholesome meats were sold, and where customers were accommodated and fairly dealt with." Still again, a decision of a court of Iowa merits citation here. The administrators of an estate were ordered to inventory and return as assets a list of names and addresses of definite persons and correspondents, together with the good will of a deceased land agent: "the same to be assets subject to sale."⁵⁶ Consequently, it may be concluded from these excerpts that the courts frequently view active patronage either as good will itself or as the material basis of it. In short, it need hardly be

⁵¹ See *Chittenden v. Witbeck*, *supra*, footnote 7, p. 420.

⁵² *Myers v. Kalamazoo Buggy Co.*, *supra*, footnote 8.

⁵³ *Vonderbank v. Schmidt*, *supra*, footnote 23.

⁵⁴ *Ibid.*, 270.

⁵⁵ See *Succession of Journe*, *supra*, footnote 23, p. 392. In another noteworthy decision, the firm of John Dunn, Son & Co. bought for their South American trade the entire stock of a particular machine, manufactured by a certain Mr. Craver. The good will secured by the latter was, of course, simply the patronage of this company which, if not bound by contract, could be readily transferred to some other person making the same sort of machine. Obviously the court was correct in declaring that, "The good-will in question was something which John Dunn, Son & Co. permitted him to enjoy, but to which they gave him no legal title, and might withdraw at their pleasure." *Acme Harvester Co. v. Craver* (1903) 110 Ill. App. 418-9.

⁵⁶ See *Thomson v. Winnebago County* (1878) 48 Iowa 155, 156.

said that this is a wide departure from the original land concept which is usually the governing principle in a large number of decisions.

Good will may include, as has been said, potential custom or patronage. Milk and paper routes are pertinent examples of enterprises covering a definite area or territory in which the public is constantly canvassed, trade connections established, goods sold, and within well defined limits, custom preempted for a particular purpose. But within this area are potential customers, who may still be induced to become patrons, and this potential or inchoate patronage the law protects as well as that already secured. The seller of a route of this sort is, therefore, barred from canvassing or soliciting customers within the prescribed area.⁵⁷

VI

In a few instances legal good will has taken the form of fixed impressions or conceptions on the part of the consuming public. These may be designated as reputation, kindly feeling, disposition, and habit; and by declaring them to be forms of good will, the jurist has again approached the well known view point of modern economists.

Good will has been designated in a few instances as simply the habit of trading in a certain place. This point came up in the English case of *Crawshay v. Collins*.⁵⁸ Sir Samuel Romilly, one of the counsel for the plaintiff, ventured the suggestion that "It is difficult to see how the good-will, consisting in the habit of the trade being carried on in the same place, can be distinguished; and separated from the lease of the house."⁵⁹ Although this was only a comment of one person employed as counsel, it was later quoted with approval by the Assistant Vice-Chancellor in the New York case of *Dougherty v. Van Nostrand*.⁶⁰ It may be said, therefore, that the definition of good will as a form of habit possesses a slight foothold in the common law of that State. But it is to be observed that the habit of trading is confined, according to the opinion of Mr. Justice Danforth of the New York Court of Appeals, to the premises or the place of business.⁶¹ This habit is then an active custom or tendency on the part of purchasers to frequent the place of business with the sole object of trading. In other instances the "habit of man" is made the distinct basis of good will, which is defined as expectancy that old customers will return in the future.⁶²

⁵⁷ See *Senter v. Davis*, *supra*, footnote 16, p. 455; *Wentzel v. Barbin*, *supra*, footnote 16; *Tuttle v. Hannegan*, *supra*, footnote 16; *Munsey v. Butterfield*, *supra*, footnote 16.

⁵⁸ (1808) 15 Ves. Jr. 218.

⁵⁹ *Ibid.*, *224.

⁶⁰ (1839) 1 Hoff. Ch. 68, *70; see also *Farr v. Pearce* (1818) 3 Madd. 47.

⁶¹ See *Morgan v. Schuyler* (1880) 79 N. Y. 490, 494.

⁶² *Pomeroy, Equity Jurisprudence* (Student's ed. 1907) § 1355. Furthermore, in an English case Sir George Jessel once said that the good will of a public house "is the mere habit of the customers resorting to the house." See *Ex parte Punnett*, *supra*, footnote 43, p. 233. Likewise in *Ex parte Thomas*, (1841) 2 Mont. D. & De G. 294, 296, Sir John Cross explained that "It is easy to conceive there

In its very broadest sense, good will is at times made to include, at least by implication, the friendly attitude or disposition on the part of the public toward a particular enterprise. Although this idea appeared as early as 1859, it was of slow growth. The issues over a trade mark and a trade name were said to be the same. The court in the case of *Churton v. Douglas*⁶³ did not say explicitly that good will was identical with the good disposition of the purchaser, but it did at all events find a close resemblance between the two: "And when you are parting with the good will of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that." It is still to be noted, however, that in his text on Partnership,⁶⁴ Parsons defines good will as "that benefit or advantage which rests only on the *good-will*, or kind and friendly feeling of others," but strange to say, by a backward step he then adopts the definition of Lord Eldon, the substance of which he interprets as "a hope or expectation" on the part of the owner of a business, and immediately adds that good will "is nothing more than the probability that the old customers will resort to the old place." Finally, a federal court has accepted a definition previously given of good will as "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."⁶⁵

Good will is spoken of by some writers as reputation, and this idea may be traced to Mr. Storey, who states that an "establishment, may, and often does enjoy a *reputation*, and command a price beyond the intrinsic value of the property invested therein, from the custom, which it has obtained and secured for a long time; and this is commonly called the good-will of the establishment."⁶⁶ A somewhat similar concept may be found in certain legal decisions. Thus it is declared in the case of *Trego v. Hunt*:⁶⁷ "It is the whole advantage, whatever it may be, of the reputation and connection of the firm . . ." Again, in estimating the value of good will in Ohio, trade and reputation were taken into consideration;⁶⁸ and in 1906 a court of Massachusetts declared that goods often " . . . acquire a valuable reputation, by means of a designation that could not be made the subject of a trade mark . . ." and that "It is im-

to be such a thing as local goodwill, arising from the habit which customers have been in of frequenting the same place."

⁶³ *Supra*, footnote 4, p. 189.

⁶⁴ Although he lays considerable stress on this thought and tersely asserts that, "It is a hope or expectation, which may be reasonable and strong . . .," he nevertheless concludes,—"but it is, after all, nothing more than a hope, grounded upon a probability." (4th ed. 1893) 239.

⁶⁵ See *Washburn v. National Wall Paper Co.* (C. C. A. 1897) 81 Fed. 17, 20.

⁶⁶ See Story, *Partnership* (1841) § 99.

⁶⁷ *Supra*, footnote 4, p. 24.

⁶⁸ *Anonymous—Good Will of Business* (1900) 7 Ohio N. P. Rep. 556.

portant to every one who has acquired a valuable good will in his business in that way, to have it protected as his other property is protected."⁶⁹ While these latter excerpts do not convey the more familiar and important concepts of the courts, they nevertheless illustrate sufficiently well the fact that jurists are unconsciously influenced by the more popular theories of good will and that they are gradually including in their opinions the common concepts of economists.

Lastly, in the State of Washington the good will of a business has been declared to include the faith of the public,⁷⁰ and this thought may be taken to mark one extreme in the notable evolution of good will theories which began with the simple idea in early English cases that good will was confined to the premises, embodied or inherent in some part of the productive process, and thus an advantage or benefit of the business itself. Needless to say at this point, it will require a broad logic to harmonize under the subject of good will the "land concept," on the one side, with the "faith of the public" on the other. It is a far cry from the corporeal embodiments of good will in the early decisions to the psychic elements of demand in the more recent ones.

Improper analysis in discussing good will has burdened the law with more than a score of conflicting theories. The chief analytical error lies in confusing productive efficiency, which really aids in attracting trade and good will, with the good will itself. And this confusion has led to dire consequences; for in the profits of good will have been included various gains of exploitation. The line is, therefore, imperfectly drawn between earned efficiency returns of the productive process, on the one hand, and unearned returns from restraint of good will on the other. Many forms of trade restraint and legal profiteering are due in no small measure to judicial reasoning which has made good will almost inseparable from real property.

The errors in corporation finance and accountancy are much of the same character. Writers in these fields desire, of course, to determine the value of good will. But this value itself is not good will; it is simply the price of the privilege of carrying on without interference commercial intercourse with the public. When this fact is recognized much trade restraint will fall to the ground as illegal coercion; and by making a proper distinction between the rights of the producer and those of the consumer, a natural division may be drawn between profits of efficiency and unearned surpluses of good will.

The law itself may draw this line which will give to the public fair competitive prices and to producers fair competitive profits. The remedy lies simply in preventing competitors from making either competitive or

⁶⁹ See *George G. Fox Co. v. Glynn*, *supra*, footnote 18, p. 350.

⁷⁰ See *Stanton v. Zercher*, *supra*, footnote 26, p. 391.

price-fixing agreements. And lastly, this rule, except in a field subject to government control, should prevent one corporation from voting or even holding stock in a competing enterprise.

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